Supreme Court Same-Sex Marriage Decision and an Update on Wellness Programs

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SUPREME COURT DECISION ON SAME-SEX MARRIAGE

As most readers know by this point, the U.S. Supreme Court in the case of *United States v. Windsor*, 570 U.S. ___, docket number 12-307, issued June 26, 2013, struck down the Defense of Marriage Act (DOMA). DOMA had stated that for purposes of federal law, only a marriage between persons of the opposite sex would be recognized. Hence employers did not have to offer benefit coverage to same-sex spouses regardless of whether a particular state recognized same-sex marriage because under the Employee Retirement Income Security Act of 1974 (ERISA), which controls employee benefits, federal law generally preempts state law.

It is the case, however, that even under an ERISA plan, the meaning of "spouse" is determined under state law, but DOMA restricted that interpretation. On the other hand, certain insured benefits such as group health insurance might have included same-sex spouses if same-sex marriage was recognized by the state because regulation of insurance is a traditional state function that was not preempted by ERISA.

The Supreme Court decision concluded that DOMA had to be overturned because it interfered with the traditional state responsibility of determining what constitutes a valid marriage. As the Court said:

> *The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment. This opinion and its holding are confined to those lawful marriages.*

It should be noted that this court decision did not find a constitutional right to same-sex marriage and hence did not modify the portion of DOMA that provides a state that does not recognize same-sex marriage itself does not have to recognize a same-sex marriage from other states. As of this writing, 13 states and the District of Columbia recognize same-sex marriage, but 37 states do not.

While by implication the Supreme Court has stated employee benefit plans cannot discriminate among different types of marriages recognized by the various states, it left many questions unanswered regarding the administration of an employee benefit plan. A couple of months subsequent to the issuance of the Supreme Court decision, governmental agencies did provide guidance to answer some of the administrative questions.

During August and September of 2013, both the IRS and the U.S. Department of Labor issued guidance on how plans subject to ERISA need to be adjusted in order to comply with the requirements set forth in *United States v. Windsor*.

The IRS issued its guidance first on August 29, 2013, in Revenue Ruling 2013-17. In the ruling, the rule is any same-sex couple that is married in a domestic or foreign jurisdiction that recognizes same-sex marriage will be recognized under federal tax law regardless of where the same-sex couple chooses to reside. For example, a couple married in New York, which recognizes same-sex marriages, that moves to Illinois, which does not recognize same-sex marriages, will still have the marriage recognized for purposes of ERISA by an Illinois plan sponsor.

Under a retirement plan, marital status is relevant for purposes of death benefits and obtaining spouse consent

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in making a beneficiary designation. Under a welfare benefit plan, spouse status is relevant for reimbursement under plans such as cafeteria plans and dependent-care reimbursement plans and for purposes of rights under COBRA. In addition, if a health insurance plan provides spousal coverage, coverage to a same-sex spouse will now be provided on a tax-favored basis just as is the case for opposite-sex spouses.

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The IRS guidance is effective as of September 16, 2013, with regard to qualified retirement plans. Further guidance is expected on any retroactive application to a qualified retirement plan. Both employers and individuals can file for a tax refund for prior years when payroll taxes were incurred on same-sex coverage under the IRS normal rules for claiming refunds.

The Employee Benefits Security Administration, a part of the Department of Labor, issued Technical Release No. 2013-04 on September 18, 2013. This release, like the IRS ruling, provides that whether a same-sex couple is legally married for purposes of ERISA plans will be determined by the state where the couple married and not the state where the couple resides.

It should be noted that this guidance is restricted to couples whose marriage is recognized under the laws of a state or foreign country. Other relationships that might be recognized by a state such as a domestic partnership or a civil union are not recognized as marriage under federal law.

FINAL HEALTH REFORM REGULATIONS ON WELLNESS PROGRAMS ISSUED

The IRS, Department of Labor, and Department of Health and Human Services (joint agencies) issued final regulations on the requirements that wellness programs under employer group health plans must meet. These regulations incorporate changes made to the wellness program rules made by the Patient Protection and Affordable Care Act. The regulations are found at 78 *Federal Register* 106 (June 3, 2013) pages 33176-33192. The effective date of these regulations is plan years starting on or after January 1, 2014.

The final regulations address two types of wellness programs: (1) participatory wellness programs; and (2) health-contingent wellness programs.

Under participatory wellness programs, the only requirement is that the employee participate in the program. The employee does not have to attain any particular standard related to a health factor, and the program either does not provide any reward for participation or provides a reward just for participating. Examples of such programs are reimbursement for membership at a fitness center; reward for participating in diagnostic testing, which does not require any particular outcome; reward for participating in a smoking-cessation program; reward for attending a health education seminar; and reward for completing a health risk assessment as long as no further action is required.

Under health-contingent wellness programs, there is a standard imposed that relates to a health factor; and if that standard is achieved, there is a financial reward. There are two subsets of contingent wellness programs: (1) activity-only wellness programs; and (2) outcome-based wellness programs.

An activity-only wellness program requires participation in a particular activity that is related to a health factor but does not require a particular health outcome from such activity. Examples are walking, diet, or exercise programs.

An outcome-based wellness program does require attainment of a certain outcome such as not smoking or meeting certain biometric standards.

Both activity-only and outcome-based wellness programs must meet the following five requirements:

1. The opportunity to qualify must be offered at least once a year.
2. The reward for participation cannot exceed 30% of the total cost of the premium (looking at both employee and employer portions of the premium), or in the case of smoking, 50% of the total cost. However, the two limits cannot be added to each other. For example, if a plan provides a 30% reward for meeting biometric readings, it can provide only an additional reward of 20% for smoking cessation. If family members can also participate in the wellness program, then the above premium costs will look to the cost of the coverage for the employee and enrolled family members.
3. The program must be reasonably designed to promote health or prevent disease.
4. All similarly situated employees must be treated the same, and a reasonable alternative standard (or waiver) must be made available. It should be noted that an employer can only require a doctor's note that an alternative is needed in the case of an activity-based program. An example would be a doctor's note stating the employee cannot participate in an exercise class. A doctor's note *cannot* be required to qualify for an alternative under the outcome-based program since all employees are eligible for an alternative for anyone failing the standard required in the outcome-based program. [Note: This is a major change from prior regulations under which an employee had to show through a doctor's note that an alternative method was required.] If the alternative offered is also outcome-based, the employee's personal

physician recommendations may require modifications in the alternative. There is no requirement that the personal physician participate in designing the alternative.
5. Notice of the availability of a reasonable alternative standard must be included in all plan materials.

Finally the regulations update sample language that discusses the availability of an alternative. It now reads as follows:

> *Your health plan is committed to helping you achieve your best health. Rewards for participating in a wellness program are available to all employees. If you think you might be unable to meet a standard for a reward under this wellness program, you might qualify for an opportunity to earn the same reward by different means. Contact us at [insert contact information] and we will work with you (and, if you wish, with your doctor) to find a wellness program with the same reward that is right for you in light of your health status.*

The above discussion is intended to briefly summarize certain recent legal developments in employee benefits, but is not intended to be legal advice and must not be relied upon as such. All readers are urged to raise any concerns they may have based on matters discussed in this column with experienced benefits legal counsel.